Supreme Court, U.S.
FILED
SEP 30 1999
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No. 98-1161

In The

Supreme Court of the United States

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BARBENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PAP'S A.M., T/D/B/A "KANDYLAND",

Respondent.

On Writ Of Certiorari To The Supreme Court of Pennsylvania

BRIEF OF *AMICI CURIAE* DEJA VU CONSULTING, INC. AND DEJA VU OF NASHVILLE, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Deja Vu Consulting, Inc. is a Michigan corporation that provides consulting services to exotic dance clubs throughout the United States and Canada, and licenses to those facilities the use of certain federally registered copyrights, trademarks, and service marks, including the trade name "Deja Vu." Currently, there are forty-five such businesses across the United States and Canada operating under such names as "Deja Vu," "Dreamgirls," and "Little Darlings." Although utilizing various trade names, *amici* will simply refer to these establishments as "Deja Vu" clubs. Located from the eastern seaboard in Miami Beach to the western reaches of the United States in Hawaii, Deja Vu clubs represent the largest associated group of such businesses in North America. *Amicus* Deja Vu Consulting, Inc. is included here as a representative for all of these facilities. These businesses, and particularly the type of entertainment that they provide, will be significantly affected by the ultimate decision in this case.

Deja Vu of Nashville, Inc. owns and operates one such Deja Vu club. Located in Nashville, Tennessee, this facility has presented nude performance dance entertainment to the consenting adult public since 1989. In 1994, the Tennessee legislature passed a "public indecency" statute (generally referred to as "Ch. 542"), that would arguably preclude the form of entertainment presented at this establishment. While the enforcement of Ch. 542 had been enjoined by the Sixth Circuit for much of the time

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amici curiae* discloses that he authored this brief in whole. Funding for the preparation and submission of this brief was provided exclusively by *amicus* Deja Vu Consulting, Inc. Attorneys for Petitioners and Respondent have consented to the filing of this *amicus curiae* brief. Copies of the written consents are filed contemporaneously herewith.

since its enactment, that court ultimately upheld the constitutionality of the statute on the basis that it complied with Justice Souter's concurring opinion in *Barnes*. Deja Vu of Nashville, Inc. is now a petitioner in this Court in the case of *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, et al.*, No. 98-1935, requesting review of that ruling. The decision here will therefore materially affect Deja Vu of Nashville, Inc. and control any further review of the constitutionality of Ch. 542.

"DEJA VU" AND THE ADULT CABARET INDUSTRY

> "Americans now spend more money at strip clubs than at Broadway, off-Broadway, regional, and non-profit theaters; at the opera, the ballet and jazz and classical music performances – ***combined***."

U.S. News & Report, Feb. 10, 1997, at p. 44 (emphasis added).

These "strip clubs," or "adult cabarets" as they are normally referred to by municipalities in the regulations thereof, generally exist in one of three formats. First, are establishments licensed to serve alcoholic beverages which usually, as a result of state and local laws governing the distribution of intoxicants, only present "topless" dancing. Second, are the businesses that present fully nude performance dance entertainment, but which only serve soft drinks and the like. These non-alcohol establishments are generally referred to in the industry as "juice bars." Third, are the "BYOB" facilities which while not licensed to sell or furnish liquor, permit patrons to bring in their own alcoholic beverages. These are generally referred to as "bottle clubs." Pap's *Kandyland* was such an establishment. *Pap's A.M. v. City of Erie*, 674 A.2d 338, 341 n.2 (Pa. Commw. Ct. 1998).

Primarily, although not exclusively, Deja Vu clubs are non-alcohol facilities that present live fully-nude performance dance entertainment to the consenting adult public. Minors are not allowed in these establishments.

While the Deja Vu clubs represent the largest association of adult cabarets throughout the country, they are merely a small fraction of the overall industry. U.S. News & World Report reported in 1997 that there were then approximately 2,500 of the "major" type of facilities in the country. *U.S. News & World Report*, Feb. 10, 1997, at p. 48. Exotic Dancer Directory, an international directory of adult cabarets (published by E.D. Publications, Inc.; the organization being found at www.exotic-dancer.com), lists over 2,100 such clubs in its 1998-99 directory alone. Scores of talent agencies exist that do nothing but place exotic dancers at clubs around the United States.

Shortly after this Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *USA Today* reported that the exotic dance club industry generated yearly figures of ten million patrons, three billion dollars spent in the upper-end type of facilities, and two billion dollars earned by entertainers. August 12, 1991, at p. B5; March 10, 1992, at p. B8.

The industry holds a national convention every year in Las Vegas hosted by E.D. Publications, Inc., which is known as the Exotic Dancer Expo. This year, the convention – sponsored by Associated Underwriters, Inc., a national insurance underwriter, and Budweiser – was held at Caesar's Palace, and comprised of a trade show with 159 vendors (consisting of such industry suppliers as costuming, club lighting, sound systems, furniture, beverage dispensing equipment, commercial kitchen supplies, business organization software, insurance, talent

agents, and the like); an awards banquet hosted by comedian/movie actor Pauly Shore; and the "finals" of various talent competitions for "exotic dancer of the year."

This industry has moved from the fringes of society to the mainstream of popular entertainment.

SUMMARY OF ARGUMENT

Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), adopting a "secondary effects" analysis in order to determine the constitutionality of anti-nudity regulations, neither represents the constitutional "holding" of that decision (in that it is not the position taken by those Justices who concurred on the "narrowest grounds" pursuant to *Marks v. United States*, 430 U.S. 188 (1977)), nor should it be adopted by this Court as an analytical framework in which to evaluate First Amendment freedoms. Such an approach fails to comport with the limitations of the secondary effects doctrine as set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and with the evidentiary obligations of the government pursuant to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). Specifically, Justice Souter's concurrence fails to comply with the precedent of this Court in regard to content-neutrality analysis; it absolves the government of the evidentiary burden to establish that the law will further an important or substantial governmental interest in a direct and effective way; it attempts to create a delineation between legal and illegal forms of nude performance dance entertainment that not only fails to comport with the prior precedent of this Court but which is unworkable in application; and it fundamentally ignores the basic tenet of the secondary effects doctrine – that

being that the regulated expression may still be presented.

In addition, reversal of the decision of the Pennsylvania Supreme Court will have unintended consequences that well-exemplify that true and substantial governmental interests will not be furthered by permitting the government to ban nude and semi-nude performance dance entertainment performed before a consenting adult audience.

Finally, the ultimate conclusion of the Pennsylvania Supreme Court was correct. The Erie ordinance does not pass constitutional muster under the First Amendment jurisprudence of this Court. It fails to further governmental interests, and it is not narrowly tailored under either the *Barnes* plurality opinion or under Justice Souter's concurrence. The decision of the Pennsylvania Supreme Court should therefore be affirmed.

ARGUMENT

I. JUSTICE SOUTER'S CONCURRING OPINION IN *BARNES* SHOULD NOT BE UTILIZED TO EVALUATE THE CONSTITUTIONALITY OF THE CITY OF ERIE ORDINANCE.

In its briefing to this Court, the City of Erie acknowledges the confusion in the inferior courts as to which opinion represents the constitutional "holding" of *Barnes* (Brief, p. 12), asserts that its ordinance would pass constitutional muster under either the plurality opinion authored by the Chief Justice or under the "secondary effects" concurring opinion of Justice Souter (pp. 17-18), but never ultimately takes a position as to which of the three opinions concurring in the *Barnes* judgment represents the appropriate framework in which to adjudicate these constitutional issues. Rather, the city contends that reversal is mandated by the mere fact that five Justices

concurred that the Indiana statute at issue in *Barnes* was constitutional (pp. 11-12).

Such logic does little, however, to reduce the turmoil in the lower courts – created by the fractured nature of *Barnes* – regarding the appropriate legal analysis that should be used to adjudicate the constitutionality of such laws. The widely conflicting – and in some cases diametrically opposed – decisions in this jurisprudential arena warrant this Court in expounding on its decision in *Barnes* and establishing a clear standard for courts to utilize in evaluating these constitutional issues. In furtherance of that endeavor, *amici curiae* assert that Justice Souter's "secondary effects" concurrence in *Barnes* neither represents the constitutional holding of that decision, nor provides an appropriate constitutional framework in which to evaluate First Amendment rights.

A. JUSTICE SOUTER'S CONCURRENCE IN *BARNES* DOES NOT REPRESENT THE HOLDING OF THAT DECISION.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court held that:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . ' "

Id. at 193, *quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Justice Souter's concurrence in *Barnes* cannot constitute the "narrowest grounds" of the decision because his approach is inapposite to both the plurality opinion authored by the Chief Justice and to Justice Scalia's concurring opinion.

Justice Souter's analysis specifically targets only nudity that he concedes is integrated into expressive conduct; erotic dance performed strictly in "adult" establishments. 501 U.S. 583 (Souter, J., concurring). His contemplated constitutional regulation would neither then apply to, for example, an individual standing naked on a crowded street corner, nor, apparently, to nudity or even nude dancing in certain "theatrical" performances. 501 U.S. 585 n.2 (Souter, J., concurring).

The opinion authored by the Chief Justice and joined in by Justices O'Connor and Kennedy clearly would not permit, however, such targeting. Rather, the plurality rested its decision on the general applicability of the Indiana statute. "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity ***across the board***." *Barnes*, 501 U.S. at 566 (emphasis added). As the plurality observed:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes, and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, ***whether or not it is combined with expressive activity.***"

Id. at 571 (emphasis added). Because of this "content-neutrality," the plurality concluded that the statute was then properly analyzed as a "time, place, or manner" regulation. *Id.* at 566-67.

Justice Souter's concurring opinion also fails to comport with the legitimate *justification* for such a regulation as articulated by the *Barnes* plurality: The protection of societal order and morality. *Barnes*, 501 U.S. at 568-569. As the plurality opinion concludes:

> " . . . [T]he governmental interest served by the text of the prohibition is societal disapproval of

nudity in public places and among strangers. ***The statutory prohibition is not a means to some greater end, but an end in itself.***"

Barnes, 501 U.S. at 571-72 (emphasis added). The "end in itself" is the assurance that public nudity will not occur – anywhere. An "across the board" prohibition as contemplated by the plurality arguably furthers such a moral goal, while a regulation in conformity with Justice Souter's concurrence would permit broad exceptions to the prohibitions, contrary to the very underpinning of the opinion authored by the Chief Justice.[2]

Nor does Justice Souter's concurrence comport with the opinion of Justice Scalia, which also eschewed the targeting of "expressive nudity." *Barnes*, 501 U.S. at 574,

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[2] Allowing adults, and even minors, to view the productions of, for example, "Hair" or "Equus" (as would apparently be permitted pursuant to Justice Souter's approach – *Barnes*, 501 U.S. at 585 n.2), while precluding consenting adults from viewing nude performance dance entertainment at Pap's, establishes any alleged moral basis for the law to be illusory, and otherwise renders such a regulation unconstitutional. *See, e.g., City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994) ("exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place"); and *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-542 (1989) (a law banning First Amendment activity by some but not by others "cannot be defended on the ground that partial prohibitions may effect partial relief"). *See also, Church of Lukumi v. Hialeah*, 508 U.S. 520, 546-47 (1993) (where government "restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law "cannot be regarded as protecting an interest 'of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited' ").

576 (Scalia, J., concurring). Justice Scalia observed that a regulation will be determined to be unconstitutional where the government "prohibits conduct *precisely because of its communicative attributes.*" *Id.* at 577 (emphasis added). In addition, Justice Scalia would not appear to endorse Justice Souter's delineation between permissible and criminal nude dancing. *Id.*, at 574 n.2.

In that Justice Souter's analysis specifically *requires* the targeting of expressive conduct and distinguishing between different forms of expression, his position is then directly contrary to the opinions of all of other Justices concurring in the judgment. Accordingly, his secondary effects analysis cannot represent, under *Marks*, the constitutional holding of this Court in *Barnes*.

B. JUSTICE SOUTER'S SECONDARY EFFECTS APPROACH AS SET FORTH IN HIS *BARNES* CONCURRENCE SHOULD NOT BE UTILIZED BY THIS COURT AS AN ANALYTICAL FRAMEWORK IN WHICH TO EVALUATE THE CONSTITUTIONALITY OF ANTI-NUDITY OR OTHER NON-ZONING REGULATIONS.

Even though Justice Souter's "secondary effects" analysis cannot represent the holding of *Barnes*, it should not be adopted as the analytical framework for evaluating the constitutionality of anti-nudity and other non-zoning regulations, in that it has the ultimate effect of overturning both the constitutional parameters of the secondary effects doctrine as established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and the evidentiary obligations of the government pursuant

to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968).[3]

First, Justice Souter's opinion fails to adhere to the limitations of "content-neutrality" analysis as set forth in *Renton*. There, this Court noted that although the ordinance treated theaters that specialized in adult films "differently from other kinds of theaters," it was not "aimed [ ] at the *content* of the films shown." *Renton*, 475 U.S. at 47 (emphasis in original). However, the four member dissent in *Barnes* concluded that "[t]he nudity is itself an expressive component of the dance, not merely incidental 'conduct'," 501 U.S. at 592 (White, J., dissenting), and on this particular point, Justice Souter agreed:

> " . . . When nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are ***integrated into the dance and its expressive function.***"

501 U.S. at 581 (Souter, J., concurring) (emphasis added). Therefore, a regulation that is directed at nudity as a component of expression – which would be the case in regard to a law enacted under Justice Souter's approach – is directed at the *content* of the entertainment, and therefore violates the *Renton* concept of content-neutrality.

Nor can Justice Souter's analysis in *Barnes* be reconciled with other decisions of this Court in regard to content-neutrality. Subsequent to both *Barnes* and *Renton*,

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[3] *Amici* do not mean to imply that they concede that such regulations should be evaluated pursuant to intermediate scrutiny. Rather, *amici* are in full agreement with the analysis undertaken by the Pennsylvania Supreme Court, and make these arguments here only to the extent that this Court continues to analyze the constitutionality of such regulations pursuant to the *O'Brien* test.

this Court observed that when analyzing whether regulations impermissibly infringe upon protected expression, courts must not accept at face value the supposed legislative motivation for enacting such laws. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) (regulation neutral on its face may be nevertheless content-based if its "manifest purpose" is to regulate speech because of the message it conveys).

Discriminatory treatment of expression is suspect under the First Amendment, even when the legislature may not necessarily facially intend to suppress certain ideas. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), *citing Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991). As long as there is facial discrimination of speech and/or expression, the law is then "content-based." *Id.* Thus, differential treatment of expressive nudity, which appears to be required under Justice Souter's approach, renders such a targeted regulation "content-based" by "any common sense understanding of the term. . . . " *Discovery Network*, 507 U.S. at 429. *See also, Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516-17 (1991) (the Court noting that an ordinance that distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content takes "the regulation out of the domain of time, place, and manner restrictions"); *Church of Lukumi*, 508 U.S. at 536-537 (a "pattern of exemptions" can establish the targeting of First Amendment rights).

In addition, Justice Souter's approach cannot be reconciled with the fundamental limitation of the secondary effects doctrine as expressed by the majority in *Renton*; that being that "adult" entertainment will be permitted to continue, albeit in limited geographic areas. This Court concluded in *Renton* that the First Amendment precluded the municipality from "effectively denying respondents a

reasonable opportunity to open and operate an ***adult*** theater within the city. . . . " 475 U.S. at 54 (emphasis added). Yet, Justice Souter's extension of the secondary effects doctrine would eviscerate this restriction by granting government the right to preclude these types of "adult" businesses by requiring the content of the dance expression to be modified so that it is no longer "adult." *See, e.g.*, 501 U.S. at 586 (Souter, J., concurring) (noting the state's interest in "banning nude dancing").

And, there is nothing in his opinion that would preclude the extension of his secondary effects approach to films, books, and magazines. Government could prohibit nudity in such materials in an effort to ameliorate secondary effects. Yet, if a regulation had the effect of banning "adult" materials altogether, it would certainly otherwise violate the content-neutrality analysis in *Renton*, it would be subject to strict constitutional scrutiny, and it would then be presumed to be unconstitutional. Accordingly, Justice Souter's concurrence in *Barnes* cannot be reconciled with the secondary effects doctrine as annunciated by a majority of this Court in *Renton*.

Second, Justice Souter's extension of the secondary effects doctrine is inconsistent with the evidentiary burdens placed on the government, in intermediate scrutiny analysis, to establish the validity of the regulation. Although he determines that the appropriate criteria to utilize in determining the constitutional protections of nude performance dance entertainment are those contained in the four-part test of *O'Brien* (*Barnes*, 501 U.S. at 582), his subsequent analysis fails to adhere to that standard.

When utilizing intermediate scrutiny, this Court has clearly held that the government bears the burden of establishing that the regulation "furthers" an important or substantial interest, and that the restriction on First

Amendment freedom is "no greater than is ***essential*** to the furtherance of that interest." *Renton*, 475 U.S. at 46-47 (emphasis added); *O'Brien*, 391 U.S. at 377. In order to be able to evaluate these second and fourth prongs of the *O'Brien* test, a court must be presented with a sufficient legislative record which contains evidence "as to how effective or ineffective" the regulation is or might prove to be. *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 760 (1996). Simply put, the challenged regulation must be proven to advance the governmental interest "in a direct and effective way. . . . " *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). This burden is not satisfied by "mere speculation or conjecture," and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Courts are to carefully analyze these issues rather than merely deferring to the legislature. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508-514, 528-532 (1996) (eight Justices in two opinions rejecting the deference conferred in intermediate scrutiny cases to the legislative branch as expressed in *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344-47 (1986)).

Justice Souter's analysis fails to adhere to these longstanding requirements in numerous regards. Initially, his position fails to take into account the effectiveness of the type of regulation at issue in *Renton* – zoning restrictions – to ameliorate secondary effects. He does not, therefore, require evaluation of whether further legislation (such as the anti-nudity regulation in *Barnes*) is needed or more importantly – in the words of *O'Brien* – is either "necessary" or "essential."

And, Justice Souter's approach is inconsistent with the evidentiary obligations of the government as further clarified in *Renton*. As this Court noted in *Renton*, a

municipality need not conduct new secondary effects studies before enacting legislation "so long as whatever ***evidence*** the City ***relies upon*** is ***reasonably believed to be relevant*** to the problem that the City addresses." 475 U.S. at 51-52 (emphasis added). However, in determining that the Indiana statute at issue in *Barnes* fulfilled the second prong of *O'Brien* by furthering the substantial governmental interest in limiting secondary effects, Justice Souter concluded that he did "not believe that a State is required affirmatively to undertake to litigate ***this issue*** repeatedly in every case." 501 U.S. at 584-85 (emphasis added).

What Justice Souter seems to mean by the phrase "this issue" is simply the connection of secondary effects to "adult" establishments; whatever their kind. Thus, as long as some "studies" might have, at some point, substantiated some type of secondary effects being associated with some type of "adult" business, the government need not establish either that the regulation ***furthers*** an important or substantial governmental interest, or that the infringement on First Amendment freedom is no greater than is ***essential*** to the furtherance of that interest. *O'Brien*, 391 U.S. at 377. Under Justice Souter's opinion, there is therefore under *Renton* no longer a requirement of either "***evidence***" or "reliance" thereon (whether reasonable or not) in order to fulfill the second and fourth prongs of *O'Brien*.

The failure of this approach to adhere to the constitutional principles articulated in *Renton* is highlighted by the fact that Justice Souter does not explain how he believes that requiring dancers to wear pasties and G-strings will eradicate secondary effects.[4] In fact, his

[4] *Cf., Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988, 997-98 (N.D.N.Y. 1997) (in concluding that Justice

opinion does not even express a position as to why or how adult businesses supposedly cause these problems:

> "To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are. It is possible, for example, that the higher incidents of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not."

Barnes, 501 U.S. at 585-86 (Souter, J., concurring).

Yet, this statement exemplifies the lack of a causal nexus between mandating entertainers to wear pasties and G-strings and the amelioration of secondary effects. Requiring entertainers to "cover up" would not logically have an effect of dispersing "crowds of men predisposed" to acts of prostitution and sexual assault. Similarly, if this limited clothing does not modify the content or the force of the expression (501 U.S. at 571 (plurality); 501 U.S. at 587 (Souter, J., concurring)), it is not then apparent why

Souter's concurrence could not be the constitutional holding of *Barnes*, the district court observed that there was no "logical relationship" which existed between the percentage of clothing worn by an entertainer and the occurrence of secondary effects). *Accord, Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12 (S.D. Miss. 1994); and *Pap's A.M. v. City of Erie*, 719 A.2d 273, 280 (Pa. 1998).

clothing would cause any secondary effects to be diminished. And, more importantly, if these problems are associated with the "simple *viewing* of nude bodies," the effect is primary, and not secondary. In such a circumstance, an entirely different constitutional analysis would be necessary.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court considered the constitutionality of a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that government into "public odium" or "public disrepute." *Id.* at 315. The government argued that, analogous to *Renton*, the law was content-neutral in that it was directed to remedy a secondary effect; namely, "our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The Court disagreed, finding that such an analysis "misreads *Renton*." *Id.*

> "We spoke in that decision only of *secondary* effects of speech, referring to regulations that apply to a particular category of speech because the ***regulatory targets*** happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, ***i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters,*** we concluded that the regulation was properly analyzed as content-neutral.
>
> ***Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in Renton.*** To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to ***prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.***"

Id. at 320-21 (emphasis in original and added). *See also, Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Because the "emotive impact of speech on its audience is not a 'secondary effect'," and because the code provision there regulated speech due to its "primary impact," it was content-based and therefore subject to strict scrutiny. *Boos*, 485 U.S. at 321.

If the government seeks to suppress expression out of a concern for its "likely communicative impact," such a restriction cannot be "justified without regard to the content of the regulated speech," and is, consequently, not content-neutral. *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-13 (1989). That a secondary effects analysis is therefore inappropriate here, is illustrated by the following statement of this Court in *Boos:*

> "But while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech. The ***content*** of the films being shown inside the theaters was ***irrelevant and was not the target of the regulation***. . . . In short, the ordinance in *Renton* did not ***aim*** at the suppression of free expression."

Id. at 320 (emphasis added).

A regulation under Justice Souter's analysis certainly targets "content." It is the dance performance itself which is changed. This is the antithesis of the ordinance in *Renton* which did not proscribe, alter, modify or affect, in any way, shape or form, any aspect of the entertainment at issue.

Third, Justice Souter's analysis impermissibly establishes a delineation between protected and non-protected nude performance dance entertainment. Basically, he holds that the type of nude dancing at issue here and in *Barnes* can be precluded, while "legitimate" nude theatrical dancing cannot. *Barnes*, 501 U.S. at 585 n.2 (Souter, J., concurring). Justice Souter does not, however, specifically articulate how such a distinction is to be made; this approach appears to be incongruous with long-standing precedent of this Court; and actual experience of courts post-*Barnes* establishes that attempts to delineate between protected and unprotected expression in such a fashion are unworkable.

This Court has long-held that it is improper for the government – let alone courts – to attempt to make distinctions as to the value of "speech." In the context of "expression," this concern may have been first addressed by this Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where it was asked to analyze the application of a certain copyright law that only applied to "illustrations or works connected with the *fine arts*." *Id.* at 250 (emphasis added). Confronted then with the question of what constituted the "fine arts,"[5] Justice Holmes, writing for the Court, stated that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . . " *Id.* at 251. Noting that some new forms of expression might be found repulsive and thus denied protection, the Court observed that legal protections:

> " . . . would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any

[5] At issue were pictures of ballet dancers and other performers at a circus (ironically, at that time, ballet was considered a low culture form of popular entertainment).

> public, they have a commercial value, – it would be bold to say that they have not an aesthetic and educational value, – ***and the taste of any public is not to be treated with contempt.***[6] ***It is an ultimate fact for the moment, whatever may be our hopes for a change.***"

Id. at 251-252 (emphasis added).

Similarly, in *Winters v. New York*, 333 U.S. 507 (1948), when dealing with a regulation that prohibited the "massing of stories of bloodshed and lust in such a way to incite to crime against the person," *id.* at 514, this Court held that "though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. *See also, Cohen v. California*, 403 U.S. 15 (1971), where Mr. Justice Harlan, writing on behalf of the Court, observed that while the vulgar expression in question was "more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is larger because governmental officials cannot make principled distinctions in this area that the Constitution leaves matter of taste and style so largely to the individual." *Id.* at 25. And, in regard to the expression at issue here, this Court noted in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), that an entertainment program could not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Id.* at 66.

[6] This comment should be placed in context with the reference, *supra*, that Americans now spend more money at adult cabarets than at all of the supposed "fine [performance] arts" combined.

The targeting of only one form (or aspect) of nude performance dance entertainment does not then pass constitutional muster under the First Amendment. The State may enact reasonable time, place, and manner regulations applicable to "all speech irrespective of content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.*

Actual experience by courts in attempting to apply Justice Souter's demarcation of performances at an "adult cabaret" – which may have all of the physical and entertainment attributes of a "legitimate theater" (whatever that phrase may mean) – from permissible nude "theatrical" dancing, has proven the wisdom of the words of this Court referenced above, and illustrates that his secondary effects approach is an unworkable doctrine by which to evaluate the constitutionality of these types of regulations.

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998), was the Eighth Circuit's foray into *Barnes*. There, the court was confronted with an Iowa statutory amendment that precluded certain forms of nudity not just in alcohol establishments as had been the case in the past, but in all businesses "required to obtain a sales tax permit."[7] *Id.* at 901-02. The Eighth Circuit concluded that the statute passed muster under Justice Souter's concurrence in

[7] The Eighth Circuit never explains how businesses required to obtain a sales tax permit are associated with secondary effects.

Barnes, id. at 904-06, and rejected the plaintiffs' overbreadth challenge because it found that a statutory "theatrical performances" exception[8] "appropriately limits the reach of the restrictions ***to the type of adult entertainment that is associated with harmful secondary effects.***" *Id.* at 905 (emphasis added).

After the decision of the district court (which had also upheld the constitutionality of the statute) but before the circuit court had ruled, Mr. Farkas continued to permit nude dancing at his "adult" establishment and was prosecuted for violating the Iowa statute, as was a gentlemen by the name of Jeffery Marshall. In pre-trial motions, the court ruled in both cases that it was the government's burden to establish that the defendants did ***not*** fall within the "theatrical performances" exception. App. 4-5, 11; 15-16, 19.

Mr. Marshall was acquitted in a bench trial when the court held that the evidence failed to rise to a level from which a rational trier-of-fact could conclude that the adult entertainment establishment at issue there was not a "theater" as that term was used in the statute. App. 20-28. The state then moved to dismiss the charges against Mr. Farkas predicated upon its belief that an acquittal of Mr. Farkas was preordained. App. 29-31. The state court agreed. App. 32.

Thus, even though the Eighth Circuit concluded that the statute was not overbroad because it was limited to Mr. Farkas' type of adult entertainment establishment, the state trial court had already concluded that Mr.

[8] "The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances. . . ." 151 F.3d at 902.

Farkas' business did not, in fact, fall within the purview of the statutory prohibitions. This experience illustrates the impropriety, as recognized by this Court, of attempting to distinguish between various forms of otherwise protected expression,[9] and exemplifies why Justice Souter's secondary effects approach should not be embraced by this Court.

II. THE ULTIMATE CONCLUSION OF THE PENNSYLVANIA SUPREME COURT WAS CORRECT.

The conduct of the City of Erie in deciding not to enforce the challenged ordinance against "theatrical productions" illustrates why the protection of morality, as discussed in the plurality opinion in *Barnes*, is an improper basis for criminalizing expressive activities. Exempting out "legitimate theater" from the prohibitions of these types of regulations well-illustrates the impermissible targeting of this form of entertainment.

In Pennsylvania, there is already an existing state statute similar to the law of general applicability described in the *Barnes* plurality opinion. 18 Pa. Cons. Stat. §5901 (1973), provides that it is a misdemeanor for an individual to commit any lewd act – of which nudity is included – if he or she knows that it is "likely to be observed by others who would be affronted or alarmed."

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[9] *See also, Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978) (the Supreme Judicial Court of Massachusetts observing that requiring the government to distinguish between nudity as it occurs in a work of "artistic and socially redeeming significance" as opposed to "the customary 'bar room' type of nude dancing," would be to make the police and courts "artistic constables" with the job of "evaluating the artistic worth and tasteful quality of the performance in its total context").

This statute applies to exactly the type of conduct discussed in the plurality opinion, as well as the "activities having no communicative element" mentioned in the concurrence of Justice Scalia (*Barnes*, 501 U.S. at 574). Conduct prosecuted under this statute has included masturbation in public (*Commonwealth v. Heinbaugh*, 354 A.2d 244 (1976)), and a nude man who strolled into a public pizza parlor (*Commonwealth v. Anzulewicz*, 42 Pa. D. & C.2d 484 (Q.S. Mont. Cnty. 1967)).

The application of that statute to expressive activity was clarified, however, in *Commonwealth v. Allsup*, 392 A.2d 1309 (Penn. 1978), where the defendant had performed fully nude on a stage. The Pennsylvania Supreme Court unanimously concluded that the statute comes into play "only when the lewd conduct of the defendant occurs in a place and at a time when it is likely to be observed by persons who have not consented to its occurrence, or who have not specially positioned themselves in such a manner as to be able to observe it, and who are likely to be affronted by such conduct or to find such conduct alarming." *Id.* at 1311. Because adult patrons in the bar at issue had paid an admission fee and seemed to regard the performance as "entertainment," this conduct, the court concluded, did not meet the requirements of the statute. *Id.* at 1312.

Accordingly, the Erie ordinance is not narrowly tailored in that its restrictions on First Amendment freedoms (the dancing at Pap's) are greater than ***essential*** to the furtherance of "societal order and morality." The provisions of 18 Pa. Cons. Stat. §5901 (1973) further these substantial governmental concerns, yet cause no damage to constitutionally protected expression being presented before a consenting adult audience. A broader regulation, such as the Erie ordinance, fails "narrow-tailoring." *Ward*,

491 U.S. 799; *Denver Area Educ. Tel.*, 518 U.S. at 755-756. In addition, any contention that the protection of morality constitutes a justifiable basis under the *Barnes* plurality for enacting this ordinance is illusory, in that the City asserts that it currently has no intention of enforcing the regulation against "theatrical productions."

III. THE UNINTENDED CONSEQUENCES OF REVERSAL ESTABLISH THE LACK OF IMPORTANT OR SUBSTANTIAL INTERESTS TO SUSTAIN THE ORDINANCE.

Unlike the zoning decision in *Renton* and the licensing ruling in *FW/PBS*, a reversal here will have the unmistakable effect of changing the nature (and *amici* would argue "content") of the entertainment presented at many facilities across the United States. Entertainers can, and in various areas will, be required to wear at least "pasties and G-strings," and if past precedent has been any indicator, they may be required to adorn far more than that. *See, e.g., Cafe 207 v. St. Johns County*, 856 F. Supp. 641, 646 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) ("it does not seem to me from a constitutional standpoint that a modest increase in the amount of body covering required by the law [over and above the clothing mandated in *Barnes*] really adds any significant, incremental burden on the expressive component of the dance"); *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 381 (E.D. Ky. 1993) (upholding an ordinance that required entertainers to wear bathing suits). A reversal in this action will then have both the legal and practical result of transforming what the law currently now considers to be (and regulates as) "adult" cabarets into non-adult businesses. This will have at least three profound consequent effects.

First, the zoning of "adult" businesses (including cabarets) is now firmly entrenched in the jurisprudence of this Nation. These regulations tend to parrot the ordinance at issue in *Renton*, which applied only to theaters that presented films depicting "specified sexual activities" or "specified anatomical areas." *Renton*, 475 U.S. at 44. These "specified anatomical areas" are those which are banned by an anti-nudity ordinance such as the one at issue here. A reversal will mean that for those municipalities with anti-nudity regulations, any "adult cabarets" within its borders would no longer be subject to adult use zoning restrictions, since they would no longer present "adult" entertainment.[10] It cannot further an important or substantial interest to render these zoning regulations, which now exist in virtually every jurisdiction, unenforceable against cabarets.

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[10] The question would then be whether the zoning laws that apply to "adult" entertainment facilities could be rewritten to constitutionally apply to "bikini clubs." This raises an interesting analytical dilemma, particularly if this Court is inclined to adopt Justice Souter's "secondary effects" *Barnes* concurrence as the constitutional framework in which to evaluate anti-nudity regulations. To pass muster under the second and fourth prongs of *O'Brien*, the government would have to establish that requiring dancers to "don pasties and G-strings" would reduce secondary effects in a direct and effective way. *Ward*, 491 U.S. at 800. If it does, there is then a proper justification for the law. And, of course, if it does ameliorate perceived secondary effects, there would then be no basis to extend these laws to regulate "bikini clubs." On the other hand, if requiring dancers to "cover up" does not eliminate secondary effects – which would have to be the conclusion as a justification for further regulation of "bikini clubs" (whether by way of zoning, licensing or other means) – there was then no legal basis for the anti-nudity regulation in the first place and it fails to pass muster under *O'Brien*.

Second, the industry, and particularly the "juice bars" (such as most of the Deja Vu clubs) which neither sell nor permit the consumption of alcoholic beverages on the premises, will have to adjust the operation of their businesses in consideration of market forces. With the way that the laws are generally structured today, juice bars can economically exist in competition with alcohol establishments because they can offer a form of entertainment that the liquor facilities cannot legally provide; they can present fully nude entertainment, whereas the alcohol clubs can generally only present topless dancing.

A reversal here will place all three different types of cabarets (alcohol establishments, juice bars, and bottle clubs) on an equal footing in regard to the type of entertainment that they can present. Accordingly, the juice bars will be at a significant economic disadvantage, in that patrons, when confronted with the choice of going to two different establishments to see the same type of entertainment – one that serves alcohol and one that does not – will generally choose the alcohol establishment. This unquestionable reality will require the vast number of juice bars around the country to obtain liquor licenses simply as a matter of economic preservation.

Such a consequent result would seem to be antithetical to the important governmental interests as expressed in prior decisions of this Court, and as understood by way of "common sense" in regard to the general evils of intoxicants. This Court and others have long referred to the negative effect by the combination of alcohol and erotic dancing. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in upholding a regulation that banned topless dancing in establishments that were licensed to serve alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977),

which stated that "[c]ommon sense indicates that any form of ***nudity coupled with alcohol in a public place begets undesirable behavior***") (emphasis added); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96 (1986) (the city commission in the preamble to an ordinance prohibiting nude or nearly nude activity on premises licensed to sell alcoholic beverages had determined that "***nude dancing in establishments serving liquor was 'injurious to the citizens' of the city***") (emphasis added); *Jott, Inc. v. Charter Township of Clinton*, 569 N.W.2d 841, 854-55 (Mich. App. 1997) (regulation banning nudity in establishments that sold alcoholic beverages was constitutional as a measure to "eradicate the effects of 'undesirable behavior' stemming from a ***combination of alcohol and nudity***") (emphasis added); *Lounge Management, Ltd. v. Trenton*, 580 N.W.2d 156, 161-62 (Wis. 1998), *cert. denied*, 119 S.Ct. 511 (1998) (ordinance which prohibited all depictions of nudity – whether live or pictorial – in all business establishments was unconstitutionally overbroad because the regulation had "no connection to the ***potential harmful secondary effects arising from nude dancing in liquor licensed establishments***") (emphasis added). *See, also, California v. La Rue*, 409 U.S. 109, 114, 118 (1972); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975).

In addition, the general concerns relating to alcoholic beverages alone – drunk driving, unruly customers, illness, and the like – are self-apparent, and have contributed to a large part of this industry voluntarily choosing not to engage in the distribution of intoxicants. These concerns of limiting the distribution of alcohol are, indeed, legitimate, substantial, and important governmental interests. Yet, by reversing the Pennsylvania Supreme Court decision here, this Court would be pushing a large segment of the exotic dance club industry

directly in the opposite direction to a position where they would either have to obtain liquor licenses to ensure economic survival or close their doors because of a lack of customers. Drastically expanding the number of entertainment establishments that sell alcoholic beverages cannot be considered under any analysis, however, to further important governmental concerns.

Under the precedent discussed above, the government has ample authority to regulate problems attendant to the combination of alcohol and exotic dancing. Accordingly, if this Court determines that modification of the decision of the Pennsylvania Supreme Court is warranted, it should merely clarify that states and municipalities are still free to prohibit the presentation of either fully nude or even topless dancing in establishments that dispense intoxicating beverages. By limiting the right of the State to prohibit such entertainment in only establishments that sell alcohol, this Court would serve the governmental interests noted in the decisions previously referenced, and particularly in *La Rue*, while at the same time providing weight and force to its eight Member conclusion in *Barnes* that the type of entertainment at issue here falls within the protections of the First Amendment. Such a limitation is warranted because, after all, this Court in *La Rue* rested its decision (that nude and semi-nude entertainment could be constitutionally prohibited in places that serve intoxicating beverages) on the "***critical fact***" that the State had "***not*** proscribed such performances ***across the board***." *La Rue*, 409 U.S. at 118 (emphasis added).

Third, also entrenched in the jurisprudence of this Nation are statutes in most every state which preclude minors from being given access to live entertainment performances that contain nudity or semi-nudity (topless

females).[11] It is these statutes which preclude minors from gaining access to adult cabarets. The protections as contained in these statutes would be rendered meaningless by a reversal here. Once entertainers can be required to wear the type of clothing that takes their performances out of the purview of the statutes, minors will no longer then be legally precluded from either entering these facilities as patrons or viewing therein the "bikini dancing" that can be permissibly conducted. In addition, without any form of (statutorily defined) "adult" entertainment being displayed, laws that prohibit minors from performing as entertainers in such facilities[12] would be

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[11] Some statutes merely preclude minors in places where nude or semi-nude entertainment is displayed. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3556(A) (West 1989); and Del. Code Ann. tit. 24, §1629(a) (1997), and the definitions of "adult entertainment establishment" as found in §1602(2) and "specified sexual activities" as found in §1602(17)(d). Other statutes involving the display of matter obscene to minors (also and usually defined as being "harmful to minors") require, as a predicate, the presentation of certain forms of nudity. *See, e.g.*, Kan. Stat. Ann. §21-4301c(a)(3) (1995), and the underlying definitions of "harmful to minors" and "nudity" as found in §21-4301c(d)(2) and (5); N.J. Stat. Ann. §2C:34-3(b) (West 1995), and the definitions of "obscene material" and "specified anatomical area" as set forth in §2C:34-3(a)(1) and (3); Ohio Rev. Code Ann. §2907.31(A)(1)-(3) (Anderson 1996), and the definitions of "harmful to juveniles" and "nudity" as set forth in §2907.01(E) and (H); and Vt. Stat. Ann. tit. 13, §2802(b)(1)-(3) (1998), and the definitions of "nudity" and "harmful to minors" as set forth in §2801(2) and (6). Yet, other statutes specifically define an "obscene" or "harmful" performance as to minors simply as one that contains nudity. *See, e.g.*, Or. Rev. Stat. §167.075(1) (1990), and the definitions of an "obscene performance" and of "nudity" as set forth in §167.060(5) and (6).

[12] It is criminal in many jurisdictions for minors to perform as exotic entertainers by exposing genitals and other specifically

unenforceable in regard to clubs required to comply with an anti-nudity regulation. Certainly, no substantial governmental interest would be furthered by these results.

CONCLUSION

For the reasons as set forth herein, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully Submitted,

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defined sexual body parts. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3552(A)(2); Ga. Code Ann. §16-12-100(b)(3), and the underlying definition of "sexually explicit conduct" to include the exhibition of the genitals or pubic area as set forth in §16-12-100(a)(4)(D); and Utah Code Ann. §76-5a-3(1)(a) (1995), and the definition of "nude or partially nude" as set forth in §76-5a-2(5). Numerous other states (and the District of Columbia) have similar laws.

APPENDIX

"A"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. JEFF PAUL MARSHALL, Defendant.	)	No. SRCR202583 RULING ON MOTIONS (Filed Apr. 30, 1998)

On April 17, 1998, this matter came before the Court on the defendant's combined pretrial motions filed February 18, 1998. The State was represented by Assistant Scott County Attorney Robert Weinberg. The defendant appeared personally and was represented by Attorney John Moeller. The defendant filed with the Court an exhibit list with accompanying exhibits A-L inclusive. The defendant also filed with the Court a statement of facts believed to be undisputed. Subsequent to the hearing, the State filed with the Court a resistance to the defendant's statement and exhibits, however subsequently counsel for the parties advised the Court that they agreed the Court could consider the defendant's exhibits and statement solely for purposes of the motions, but that the State was not stipulating to the truth of the matters contained therein.

The defendant's combined pretrial motions are really a single motion to dismiss asserting three separate grounds for dismissal: (1) that the statute at issue is invalid as a violation of the single subject requirement of Article III, Section 29 of the Iowa Constitution; (2) that the statute is not applicable to this defendant because the

business at issue is not required to obtain a sales tax permit; and (3) that the statute at issue is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Also, at the time of the hearing, counsel for the parties made oral motions pursuant to Rule of Evidence 104 to determine which party bears the burden of proof on issues concerning the relevant statute's "sales tax" requirement and exceptions to its application.

The statute in question was enacted as Section 3 of Senate File 503 which subsequently was compiled at Section 3, Chapter 125, 1997 Iowa Acts. That provision amended Section 728.5, Iowa Code (1997), to read as follows:

> "An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:
>
> 1. If such person allows or permits the actual or simulated public performance of any sex act upon or in such place of business.
>
> 2. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.
>
> 3. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

> 4. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.
>
> 5. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.
>
> 6. If such person allows or permits a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons. However, if such person allows or permits a minor to participate in any act included in subsections 1 through 4, the person shall be guilty of an aggravated misdemeanor.
>
> The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances."

The Court finds from its analysis of the statute that the State must prove the following elements to obtain a conviction under the statute:

1. On or about May 9, 1997, the defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa.

2. That at that time, the place of business was required to obtain a sales tax permit.

3. That at that time, the defendant:

a. Allowed or permitted the actual or simulated public performance of any sex act upon or in such place of business; or

b. Allowed or permitted the exposure of the genitals or buttocks or female breasts of any person who acted as a waiter or waitress; or

c. Allowed or permitted the exposure of the genitals or female breast nipple of any person who acted as an entertainer in the place of business; or

d. Allowed or permitted any person to remain in or upon the place of business who exposed to public view the person's genitals, public hair, or anus; or

e. Advertised that the activities set forth in the other subparagraphs herein was allowed or permitted in the place of business; or

f. Allowed or permitted a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons; or

g. Allowed or permitted a minor to participate in any act described in subparagraphs A-D.

Additionally, if substantial evidence appears, whether from the State of [sic] from the defendant, that the place of business is a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances set forth above were permitted or allowed as part of such art exhibits or performances, the State then must prove that the place of business is not such a place. *See, State v. Bowdry*, 337 N.W.

2d 216, 218-19 (Iowa 1993); *State v. Bohi*, 428 N.W. 2d 679, 680 (Iowa App. 1988).

Also relevant on this point is the qualifying phrase contained in the final paragraph of the statute setting forth exceptions to the application of the statute for certain businesses. The statute lists the following specific businesses as being excepted from the application of the statute: "a theater, concert hall, art center, museum." The statute then includes a further exception for a "similar establishment." The statute then sets forth the following qualifying phrase, "which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances." The question arises whether this final qualifying phrase applies only to the exception for "similar establishments" or applies as well to theaters, concert halls, art centers, and museums. In making this determination, the Court notes that a comma is placed after "museum" and before "or similar establishment." The Court further notes that no comma is included after the word establishment and before the beginning of the qualifying phrase. The Court therefore concludes that the qualifying phrase which concludes the statute only applies to the exception for similar establishments and does not apply to the exceptions for theaters, concert halls, art centers, or museums.

Moving to the defendant's motion to dismiss, the Court notes that the Iowa Rules of Criminal Procedure contain three provisions for dismissal of a trial information. *See*, R.Crim.P. 27; R.Crim.P. 10(6)(c); *and* R.Crim.P 10(6)(a). The provisions of R.Crim.P. 27 and R.Crim.P. 10(6)(c) clearly are not applicable to this case. Therefore,

the defendant's motion must be predicated on R.Crim.P. 10(6)(a) which provides, "If it appears from the bill of particulars furnished pursuant to this rule that the particulars stated do not constitution the offense charged in the . . . information or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the Court may and on motion of defendant shall dismiss the . . . information unless the prosecuting attorney shall furnish another bill of particulars which so states the particulars as to cure the defect."

The file does not reflect any motion for bill of particulars or bill of particulars being filed under R.Crim.P. 10(5). The Court notes that the minutes of testimony filed in this case are exceptional for the paucity of information contained therein. From discussions with counsel for the parties, the Court is cognizant that counsel for the State and counsel for the defendant have engaged in ongoing communication concerning the preparation of this case for trial and the presentation of these issues to the Court. The Court will assume for purposes of determining the merits of the defendant's motion to dismiss that the State has provided the defendant with a bill of particulars expanding on the minutes of testimony filed herein on an informal basis. *Cf., State v. Graham*, 291 N.W. 2d 345, 350 (Iowa 1980) (A bill of particulars is a prerequisite to a motion to dismiss under R.Crim.P. 10(6)(a)).

The defendant first argues that Section 3, Chapter 125, 1997 Iowa Acts, is unconstitutional and unenforceable as a violation of Article III, Section 29 of the Iowa Constitution. That constitutional provision states, "Every act shall embrace but one subject, and matters properly

connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Three purposes are served by this constitutional provision. The requirement serves to prevent "log rolling" which involves the combination of unrelated bills so that unfavorable legislation "rides in" with more popular legislation. The provision also facilitates the legislative process by inhibiting surprise or fraud when legislators are uninformed. Finally, the provision makes it easier for the public to be informed of proposed legislation. *State v. Taylor*, 557 N.W. 2d 523, 525 (Iowa 1996); *also State v. Mabry*, 460 N.W. 2d 472 (Iowa 1990).

This provision of the Iowa Constitution sets forth four requirements. First, an act may have only one subject together with matters germane to it. Second, the title of the act must contain the subject matter of the act. Third, any subject not mentioned in the title is invalid. Fourth, an invalid subject in the act does not invalidate the remaining portions that are expressed in the title. *Taylor*, 557 N.W. 2d at 525; *see, Mabry*, 460 N.W. 2d at 474. However, any constitutional defect relating to title or subject matter is cured once a bill is codified. *Mabry*, 460 N.W. 2d at 475. "There is a window of opportunity, however, measured from the date the bill is passed until it is codified, during which a constitutional challenge may lie." *Taylor*, 557 N.W.2d at 526.

The statute at issue in this case became effective upon the Governor's approval of the act. Thus the statute was

effective but not yet codified on the date the defendant is alleged to have violated the act, May 9, 1997. However, the defendant's challenge on this ground was not filed until February 18, 1998. In the interim, the statute was codified as Section 728.5, Iowa Code Supplement (1997). The Court concludes that the defendant's challenge pursuant to Article III, Section 29 of the Iowa Constitution is not timely.

Even if the Court were to hold that the defendant's challenge under Article III, Section 29 of the Iowa Constitution is timely, the Court notes that the statute's title provides, "An act relating to criminal justice, by providing for enhanced punishment for manufacturing methamphetamine in the presence of minors, providing restrictions on public nudity or actual or simulated public performance of sex acts in certain establishments, authorizing probation supervision and revocation by administrative parole and probation judges in the Sixth Judicial District, providing restitution for death of a victim of a crime, and providing penalties and an effective date." Clearly the title of the statute describes the provision of the statue which is at issue in this case. The act therefore does not violate the provision of the constitution which requires that the subject be expressed in the title. The question then is whether the act embraces but one subject with matters germane to it. This Court believes that the defendant seeks too restrictive an interpretation of that requirement. All the provisions named in the title of the act are related to criminal justice. The Court therefore concludes that the statute in question does not violate the single subject requirement of Article III, Section 29 of the Iowa Constitution.

The defendant also asserts that Chapter 125, Section 3, 1997 Iowa Acts violates the First and Fourteenth Amendments to the United States Constitution. Nude dancing, which is purportedly what occurred at the defendant's place of business on the date charged, is expressive conduct protected by the First Amendment. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 2460, 115 L. Ed. 2d 504, 59 USLW 4745 (1991). Whether the statute at issue violates the First Amendment ultimately turns on the choice of the appropriate standard of review. *Cf., Barnes*, 111 S. Ct. at 2475 (White J. dissenting) ("[O]ur cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.").

In making that choice, this Court is bound by the previous published decisions of the Iowa Supreme Court, the Iowa Court of Appeals, United States Supreme Court, the Eighth Circuit Court of Appeals, and the United States District Court for the Southern District of Iowa, if any decisions of such courts are controlling on the issues presented. Therefore, while this Court may find the logic of the *Barnes* dissent to be more compelling, the Court's decision must be bound by the concurring opinion of Justice Souter. *See, Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129, 134 (Sixth Cir. 1994).

Justice Souter concluded that an Indiana public nudity statute should be reviewed under the analytical framework set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). *Barnes*, 111 S.Ct. at 2468. This Court, like Judge Vietor, in *Farkas v. Miller*, No. 4-97-70357, slip op. at 17-21 (S.D. Iowa Oct. 23,

1997), finds no meaningful legal distinction between the analysis accorded the Indiana statute in *Barnes* and the analysis which should be applied to the statute at issue here.

In applying the *O'Brien* analytical approach to the statute before this Court, the Court concludes, as Judge Vietor did in *Farkas*, that Section 728.5, 1997 Iowa Code Supplement, is not vague or overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

This is not to say that the application of the statute to this defendant for the activities which are alleged to have occurred on the date charged is constitutional. That issue presents a mixed question of law and fact and is dependent on facts which may be adduced only at trial.

The defendant's final ground in support of the motion to dismiss is a claim that the statute, by its limitation to enterprises which are required to have a sales tax permit, is not applicable to the defendant's business. The defendant has provided information to the Court showing that the defendant restructured his business to attempt to eliminate any requirement that the business have a sales tax permit. The defendant also provided evidence that its previous permit had been surrendered and a final tax return filed.

This argument really relates to the question of whether the State will be able to present sufficient evidence to establish the first element of the alleged crime as that element was identified by the Court *supra*. A pretrial motion to dismiss is not available to address that issue. *Graham*, 291 N.W. 2d at 350.

In summary, the State bears the burden of proof on the elements of the charged offense as outlined above, including the burden to prove the exceptions contained in the final paragraph of the statute do not apply if substantial evidence is presented that such exceptions apply to the defendant. The defendant's motion to dismiss must be denied at this time, however the issues related to the constitutionality of the statute as applied and to the applicability of the statute to this defendant may be appropriate to a motion for judgment of acquittal at the close of the State's evidence at trial or at the close of all the evidence at trial.

IT IS THEREFORE ORDERED that the State will be required to prove beyond a reasonable doubt the elements of the charged offense as set forth herein.

IT IS FURTHER ORDERED that the defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that the Clerk shall provide copies of this ruling to counsel for the State and counsel for the defendant.

Dated at Davenport, Iowa, this 30th day of April, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX

"B"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. RONALD G. FARKAS, Defendant.	No. SRCR20870 RULING ON MOTIONS (Filed May 1, 1998)

On April 17, 1998, this matter came before the Court on the defendant's motion to dismiss filed March 4, 1998. The State was represented by Assistant Scott County Attorney Robert Weinberg. The defendant appeared personally and was represented by Attorney David Cunningham. Also, at the time of the hearing, counsel for the parties made oral motions pursuant to Rule of Evidence 104 to determine which party bears the burden of proof on issues concerning the relevant statute's "sales tax" requirement and exceptions to its application.

The statute in question was enacted as Section 3 of Senate File 503 which subsequently was compiled at Section 3, Chapter 125, 1997 Iowa Acts. That provision amended Section 728.5, Iowa Code (1997), to read as follows:

> "An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:

1. If such person allows or permits the actual or simulated public performance of any sex act upon or in such place of business.

2. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.

3. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

4. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.

5. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.

6. If such person allows or permits a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons. However, if such person allows or permits a minor to participate in any act included in subsections 1 through 4, the person shall be guilty of an aggravated misdemeanor.

The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or

allowed as part of such art exhibits or performances."

The Court finds from its analysis of the statute that the State must prove the following elements to obtain a conviction under the statute:

1. On or about May 9, 1997, the defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa.

2. That at that time, the place of business was required to obtain a sales tax permit.

3. That at that time, the defendant:

a. Allowed or permitted the actual or simulated public performance of any sex act upon or in such place of business; or

b. Allowed or permitted the exposure of the genitals or buttocks or female breasts of any person who acted as a waiter or waitress; or

c. Allowed or permitted the exposure of the genitals or female breast nipple of any person who acted as an entertainer in the place of business; or

d. Allowed or permitted any person to remain in or upon the place of business who exposed to public view the person's genitals, pubic hair, or anus; or

e. Advertised that the activities set forth in the other subparagraphs herein was allowed or permitted in the place of business; or

f. Allowed or permitted a minor to engage in or otherwise perform in a live act intended to arouse or

satisfy the sexual desires or appeal to the prurient interests of patrons; or

g. Allowed or permitted a minor to participate in any act described in subparagraphs A-D.

Additionally, if substantial evidence appears, whether from the State or from the defendant, that the place of business is a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances set forth above were permitted or allowed as part of such art exhibits or performances, the State then must prove that the place of business is not such a place. *See, State v. Bowdry,* 337 N.W. 2d 216, 218-19 (Iowa 1993); *State v. Bohi,* 428 N.W. 2d 679, 680 (Iowa App. 1988).

Also relevant on this point is the qualifying phrase contained in the final paragraph of the statute setting forth exceptions to the application of the statute for certain businesses. The statute lists the following specific businesses as being excepted from the application of the statute: "a theater, concert hall, art center, museum." The statute then includes a further exception for a "similar establishment." The statute then sets forth the following qualifying phrase, "which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances." The question arises whether this final qualifying phrase applies only to the exception for "similar establishments" or applies as well to theaters, concert halls, art centers, and museums. In making this determination, the Court

notes that a comma is placed after "museum" and before "or similar establishment." The Court further notes that no comma is included after the word establishment and before the beginning of the qualifying phrase. The Court therefore concludes that the qualifying phrase which concludes the statute only applies to the exception for similar establishments and does not apply to the exceptions for theaters, concert halls, art centers, or museums.

Moving to the defendant's motion to dismiss, the Court notes that the Iowa Rules of Criminal Procedure contain three provisions for dismissal of a trial information. *See,* R.Crim.P. 27; R.Crim.P. 10(6)(c); *and* R.Crim.P. 10(6)(a). The provisions of R.Crim.P. 27 and R.Crim.P. 10(6)(c) clearly are not applicable to this case. Therefore, the defendant's motion must be predicated on R.Crim.P. 10(6)(a) which provides, "If it appears from the bill of particulars furnished pursuant to this rule that the particulars stated do not constitute the offense charged in the . . . information or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the Court may and on motion of defendant shall dismiss the . . . information unless the prosecuting attorney shall furnish another bill of particulars which so states the particulars as to cure the defect."

The file does not reflect any motion for bill of particulars or bill of particulars being filed under R.Crim.P. 10(5). From discussions with counsel for the parties, the Court is cognizant that counsel for the State and counsel for the defendant have engaged in ongoing communication concerning the preparation of this case for trial and the presentation of these issues to the Court. The Court

will assume for purposes of determining the merits of the defendant's motion to dismiss that the State has provided the defendant with a bill of particulars expanding on the minutes of testimony filed herein on an informal basis. *Cf., State v. Graham,* 291 N.W. 2d 345, 350 (Iowa 1980) (A bill of particulars is a prerequisite to a motion to dismiss under R.Crim.P. 10(6)(a)).

The defendant asserts that Chapter 125, Section 3, 1997 Iowa Acts violates the First and Fourteenth Amendments to the United States Constitution. Nude dancing, which is purportedly what occurred at the defendant's place of business on the date charged, is expressive conduct protected by the First Amendment. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 2460, 115 L.Ed. 2d 504, 59 USLW 4745 (1991). Whether the statute at issue violates the First Amendment ultimately turns on the choice of the appropriate standard of review. *Cf., Barnes,* 111 S.Ct. at 2475 (White J. dissenting) ("[O]ur cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.").

In making that choice, this Court is bound by the previous published decisions of the Iowa Supreme Court, the Iowa Court of Appeals, United States Supreme Court, the Eight Circuit Court of Appeals, and the United States District Court for the Southern District of Iowa, if any decisions of such courts are controlling on the issues presented. Therefore, while this Court may find the logic of the *Barnes* dissent to be more compelling, the Court's decision must be bound by the concurring opinion of

Justice Souter. *See, Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (Sixth Cir. 1994).

Justice Souter concluded that an Indiana public nudity statute should be reviewed under the analytical framework set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968). *Barnes,* 111 S.Ct. at 2468. This Court, like Judge Vietor, in *Farkas v. Miller,* No. 4-97-70357, slip op. at 17-21 (S.D. Iowa Oct. 23, 1997), finds no meaningful legal distinction between the analysis accorded the Indiana statute in *Barnes* and the analysis which should be applied to the statute at issue here.

In applying the *O'Brien* analytical approach to the statute before this Court, the Court concludes, as Judge Vietor did in *Farkas,* that Section 728.5, 1997 Iowa Code Supplement, is not vague or overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

This is not to say that the application of the statute to this defendant for the activities which are alleged to have occurred on the date charged is constitutional. That issue presents a mixed question of law and fact and is dependent on facts which may be adduced only at trial.

The defendant's other argument in support of the motion to dismiss is that the business of which the defendant is the owner, manager, or person who exercises direct control over is a theater and excepted from the operation of the statute by the statute's final paragraph. The defendant has provided as an exhibit at the hearing a photocopy of a theater license issued by the City of Davenport for the business in question.

This argument really relates to the question of whether the State will be able to present sufficient evidence to establish the last element of the alleged crime as that element was identified by the Court *supra*. A pretrial motion to dismiss is not available to address that issue. *Graham*, 291 N.W. 2d at 350.

In summary, the State bears the burden of proof of the elements of the charged offense as outlined above, including the burden to prove the exceptions contained in the final paragraph of the statute do not apply if substantial evidence is presented that such exceptions apply to the defendant. The defendant's motion to dismiss must be denied at this time, however the issues related to the constitutionality of the statute as applied and to the applicability of the exceptions in the statute to this defendant may be appropriate to a motion for judgment of acquittal at the close of the State's evidence at trial or at the close of all the evidence at trial.

IT IS THEREFORE ORDERED that the State will be required to prove beyond a reasonable doubt the elements of the charged offense as set forth herein.

IT IS FURTHER ORDERED that the defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that the Clerk shall provide copies of this ruling to counsel for the State and counsel for the defendant.

Dated at Davenport, Iowa, this 1st day of May, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX
"C"

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. JEFFERY MARSHALL, Defendant.	))))))	Case No. SRCR202583 FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT (Filed May 8, 1998)

On May 4, 1998, this matter came before the Court for trial. The State was represented by Assistant Scott County Attorney Robert E. Weinberg. The Defendant appeared personally and was represented by Attorney John O. Moeller. The Court, having heard the testimony and having reviewed the evidence submitted herein, finds as follows.

The Defendant is charged with the offense of allowing public indecent exposure in violation of Section 728.5, Iowa Code Supplement (1997). The State therefore must prove beyond a reasonable doubt that:

1. On or about May 9, 1997, the Defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa;

2. That at that time, the place of business was required to obtain a sales tax permit;

3. That at that time, the Defendant allowed or permitted the exposure of the genitals or female breast nipple of a person who acted as an entertainer in the place of business, or allowed or permitted a person to remain in

or upon the place of business who exposed to public view the person's genitals, pubic hair, or anus; and

4. That the place of business is not a theater.

The Court must base its decision solely on the evidence which consists of testimony, exhibits received by the Court and stipulations between the attorneys. The Court makes deductions and reaches conclusions which reason and common sense lead the Court to make in considering the evidence. The Court is not concerned about whether the evidence is direct or circumstantial as the law makes no distinction between the weight which the Court may give to either direct or circumstantial evidence.

The Court decides the facts from the evidence using its observations, common sense and experience. The Court attempts to reconcile any conflicts in the evidence, but if the Court cannot, the Court accepts the evidence it finds more believable. The Court may believe all, part or none of any witness's testimony. In making that determination, the Court considers the reasonableness and consistency of the testimony both internally and with relationship to other evidence which the Court finds credible. The Court also considers whether a witness has made inconsistent statements, and the witness's appearance, conduct, age, intelligence, memory, knowledge of the facts, interest in the trial, motive, candor, bias and prejudice.

Pursuant to R.Crim.P. 18(8), counsel for the Defendant moved for judgment of acquittal at the close of the State's evidence and again at the conclusion of all the evidence. In each instance, the Court reserved its decision

on the motion pursuant to R.Crim.P. 18(8)(b). In making its determination of the Defendant's motion at the close of the State's evidence, the Court must consider whether the State submitted sufficient evidence from which a rational trier of fact could conclude the Defendant to be guilty beyond a reasonable doubt. With respect to the Defendant's motion made at the conclusion of all the evidence, the Court must consider whether from all the evidence submitted, a rational trier of fact could conclude that the Defendant is guilty beyond a reasonable doubt. Therefore the Court must first address the State's evidence alone to determine whether sufficient evidence was presented at that point in the trial from which a rational trier of fact could conclude the Defendant guilty beyond a reasonable doubt.

Viewing the evidence presented by the State in the light most favorable to the State, the Court concludes that on May 9, 1997, the Defendant was the manager or person exercising direct control over a place of business in Scott County, Iowa. The place of business over which the Defendant was the manager or person exercising direct control was the Southern Comfort Free Theater for the Performing Arts as well as a business called North End Storage.

The evidence also establishes that on May 9, 1997, a person who was an entertainer in the Southern Comfort Free Theater for the Performing Arts exposed her genitals and breast nipples while on stage performing her act. Although testimony was presented indicating that another female, who apparently was an entertainer, entered a room in which the sheriff's deputies and the Defendant were present and then disrobed so that she

could inspect her anal and vaginal areas, that person was not acting as an entertainer at that time. Further, such exposure was not to public view as the activity occurred in a separate room from the stage and general public, and the manager and sheriff's deputies do not constitute the public as that term is used in the statute.

The State's evidence also established that the business known as the Southern Comfort Free Theater for the Performing Arts was not engaged in any activity which requires a sales tax permit under Chapter 422, Iowa Code (1997). However, the activities of North End Storage at that time did require a sales tax permit. Although the businesses are adjoining and share common ownership and management, the State did not prove in the presentation of its evidence that the two businesses are but alter egos of the same entity. Thus the State failed to prove that on May 9, 1997, the Southern Comfort Free Theater for the Performing Arts was a place of business required to obtain a sales tax permit, and that was the place of business in which the activities prohibited by the statute occurred.

Based on the foregoing, the Court concludes that it must enter judgment of acquittal in favor of the Defendant as the State failed to present sufficient evidence from which a rational trier of fact could conclude the Defendant guilty beyond a reasonable doubt of the offense charged. This decision normally would conclude the Court's inquiry and decision. However, the Court is cognizant that this Court's decision in the matter is subject to appellate review and such review may be helped by further fact finding by this Court on the evidence presented not only in the State's portion of the trial but

also the evidence presented from witnesses called by the Defendant.

In considering all the evidence presented at trial in this matter, including the evidence adduced from witnesses called by the Defendant, the Court does conclude beyond a reasonable doubt that the Southern Comfort Free Theater for the Performing Arts and North End Storage are so common in identity and purpose as to be considered by the Court as a single business entity. Specifically, both businesses are sole proprietorships owned by the same person. Short of landing a helicopter on the roof of the Southern Comfort Free Theater for the Performing Arts one cannot gain admittance to that facility without traversing the parking lot operated by North End Storage. North End Storage charges $10.00 per person to park a vehicle on that lot or for an individual to cross that lot in order to gain access to the Southern Comfort Free Theater for the Performing Arts.

The testimony of the Defendant and the owner of the businesses clearly established that North End Storage was activated for the sole purpose of providing a subterfuge through which the Southern Comfort Free Theater for the Performing Arts could continue its operation as a facility in which totally nude dancing occurs. Such circumstances are comparable to the subterfuge rejected by the Iowa Supreme Court in *State v. Mabrey*, 244 Iowa 415, 56 N.W.2d 888 (Iowa 1953).

Thus, in considering all the evidence presented at trial, the Court concludes that sufficient evidence was presented from which this Court, as the trier of fact, concludes that the first three elements of the offense have

been established beyond a reasonable doubt. Therefore the Court must determine whether the State established beyond a reasonable doubt that the Southern Comfort Free Theater for the Performing Arts is not a theater as the term "theater" is used in Section 728.5, Iowa Code Supplement (1997).

As this Court previously ruled, if substantial evidence appears, whether from the State or from the Defendant, that the place of business is a theater, the State then must prove beyond a reasonable doubt that the place of business is not a theater. *See State v. Bowdry*, 337 N.W.2d 216, 218-19 (Iowa 1993); *State v. Bohi*, 428 N.W.2d 679, 680 (Iowa App. 1988). The Court also had ruled previous to trial that the State cannot avail itself of the qualifying phrase contained in the last paragraph of the statute, ("which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances"), as the Court determined that the qualifying phrase only applied to the exception for a "similar establishment" and not to the exceptions for "a theater, concert hall, art center, [or] museum."

The term "theater" is not defined by the statute. This Court therefore must ascertain what the legislature meant when it used the word "theater" in the list of businesses to which the statute does not apply. The Court searches "for legislative intent in what the legislature said, not what it might or should have said." *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 359 (Iowa 1982). "Words of a statute are given their plain or ordinary meaning absent legislative definition or particular meaning in the law."

State v. Jones, 524 N.W.2d 172, 174 (Iowa 1994). "Using a dictionary has been recognized as an acceptable method of ascertaining the meaning of statutory language." *Jones*, 524 N.W.2d at 174.

A "theater" has been defined as "a place where plays, operas, films, etc. are presented." *Webster's New World College Dictionary, Third Edition*, at 1386 (1996).

No evidence was presented indicating that any plays, operas, or films are presented at Southern Comfort Free Theater for the Performing Arts. From the evidence, the only activity which occurs at that facility is nude dance. Although the Defendant attempted to introduce evidence concerning dance as an art form, and specifically nude dances as an art form, the State objected to the admission of such evidence. The Court concludes that such evidence is hearsay and the State's objection is sustained.

Irrespective of the evidence proffered by the Defendant on that issue, the Court does conclude that dance, even nude dance, may be an art or one of the arts. *See Webster's New World College Dictionary*, at 77 ("creative work or its principles; a making or doing of things that display form, beauty, and unusual perception; art including painting, sculpture, architecture, music, literature, drama, the dance, etc."). That the dance performed at the Southern Comfort Free Theater for the Performing Arts is not dance as performed at Hancher Auditorium, the Galvin Fine Arts Center, or the Adler Theater is a difference of degree or quality, not a difference of kind.

The Southern Comfort Free Theater for the Performing Arts is a facility for the presentation of a form of art, though certainly not fine art based on the testimony

presented. The facility has a raised stage on which the dancers perform. The stage has specialized lighting consistent with stage lighting found in mainstream theaters such as those listed previously. A separate dressing area is provided for the entertainers before they take the stage. Seating is arranged for the patrons of the business to view the performances.

The Court determines that the evidence when viewed in its entirety fails to rise to the level of sufficient evidence from which a rational trier of fact could conclude that the Southern Comfort Free Theater for the Performing Arts is not a theater as that term is used in Section 728.5, Iowa Code Supplement (1997). Thus, the Court would be required to grant the Defendant's motion for judgment of acquittal made at the conclusion of all the evidence in this case.

Even were the Court to overrule the Defendant's motions for judgment of acquittal made at the conclusion of the State's evidence and again at the conclusion of all the evidence, this Court would conclude the Defendant to be not guilty based on the facts as found by the Court in connection with its determination of the Defendant's motions for judgment of acquittal.

The Defendant also claimed in the motions for judgment of acquittal that Section 728.5, Iowa Code Supplement (1997), violates the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution as applied to the activities conducted at the Southern Comfort Free Theater for the Performing Arts. In light of this Court's determination of the Defendant's motions on the other grounds raised, and in light of this

Court's determination that irrespective of those motions the Court would determine the Defendant to be not guilty as alleged based on the evidence presented, the Court need not address the Defendant's constitutional issues. In any event, the Defendant has not presented evidence from which this Court could determine that the statute as applied violates the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution.

As the United States Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), indicates, nude dancing is at the outer limit of constitutional protection. This Court makes no determination as to whether the activities at the Southern Comfort Free Theater for the Performing Arts described in the evidence fall within the purview of the First and Fourteenth Amendments to the United States Constitution. What this Court's determination does is establish that the evidence presented in this case failed to establish a violation of Section 728.5, Iowa Code Supplement (1997).

IT IS THEREFORE ORDERED that the Defendant is not guilty.

Dated at Davenport, Iowa, this 8th day of May, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX

"D"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

THE STATE OF IOWA, Plaintiff	)	Criminal No. SRCR208701
vs.	)	MOTION TO DISMISS
RONALD FARKAS, Defendant	)	(Filed June 25, 1998)

COMES NOW, the undersigned Prosecuting attorney and moves that the court dismiss this cause in support of its Motion to Dismiss states as follows:

1. The States testimony regarding the elements of the offense are insufficient (Code 306).

2. The State does not have sufficient evidence to prove beyond reasonable doubt that the place of business herein, Tuxedo's Show Club is not a theater as provided by the exception in Iowa Code Section 728.5.

3. The Trial Court ruled in the case of State of Iowa v. Jeffrey Marshall, Case No. SRCR202583, On May 8, 1998, that another establishment offering the same entertainment as Tuxedo's, namely Southern Comfort Free Theater for the Performing Arts, was a theater under the exception of Section 728.5.

4. Performance structures for Tuxedo's Show Club, including two stages with sophisticated, remotely controlled lighting systems, and a separate large dressing room with separate spaces for the entertainers as well as make-up mirrors and tables, is a more elaborate system than found at Southern Comfort Free Theater.

5. The City of Davenport has required Tuxedo's Show Club to purchase both a live entertainment and a theater license, which Tuxedo's Show Club has purchased and posted as required by law in full view of the public (see attached permits). Tuxedo's Show Club has had a live entertainment and theater license on its current establishment since 1995.

6. Section 17.47.020(A)(3) of the City of Davenport ordinances includes an exception clause which parallels the wording of the exception clause in Section 728.5 of the Code of Iowa and states that the regulations for an "adult entertainment business" shall not apply to a theater, see attached ordinance Section.

7. The State of Iowa could not withstand a motion a verdict acquittal under all the foregoing circumstances.

WHEREFORE, the State of Iowa prays for the Court to dismiss this cause in the interest of justice.

Dated this 25th day of June, 1998.

/s/ Illegible
ROBERT E. WEINBERC, SC0005863
Prosecuting Attorney

copies to:
Dave Cunningham
Attorney for Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause:

_ by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys

of record herein at their respective addresses disclosed on the pleadings, or

_ by depositing a copy thereof in the Office of the Scott County Court Administrator, or

X hand delivered.

on the 25 day of June, 1998.

signed: Illegible

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

THE STATE OF IOWA, Plaintiff	)	Criminal No. SRCR208701
vs.	)	ORDER TO DISMISS
RONALD FARKAS, Defendant	)	(Filed June 25, 1998)

On this 25 day of June, 1998, for reasons stated in the foregoing motion and in the interest of justice, IT IS ORDERED that the motion is granted and this cause is hereby dismissed.

The Defendant's bail, if any, is exonerated and the costs of this action are

_ Taxed to the Defendant.

X Not to be Assessed.

/s/ Gary D. McKenrick
JUDGE
Seventh Judicial District
of Iowa